Supreme Court, U.S.
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No. 99-86

IN THE

Supreme Court of the United States

WHEELING AND LAKE ERIE RAILWAY COMPANY,
Petitioner,
v.

PUBLIC UTILITY COMMISSION OF THE COMMONWEALTH OF PENNSYLVANIA; DAVID W. ROLKA, CHAIRMAN OF THE PENNSYLVANIA PUBLIC UTILITY COMMISSION; JOSEPH RHODES, JR., JOHN M. QUAIN, LISA CRUTCHFIELD AND JOHN HANGER, in their official capacities as members of the PENNSYLVANIA PUBLIC UTILITY COMMISSION, SCOTT TOWNSHIP, PENNSYLVANIA; AND JAMES P. MULLIGAN, CHAIRMAN OF THE BOARD OF COMMISSIONERS OF SCOTT TOWNSHIP, PENNSYLVANIA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION OF RESPONDENT PENNSYLVANIA PUBLIC UTILITY COMMISSION

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QUESTION PRESENTED

Did the Court of Appeals correctly rule that the Pennsylvania Public Utility Commission's allocation of a portion of the costs to Wheeling and Lake Erie Railway Company for replacing a highway bridge over its facilities was not a tax pursuant to 49 U.S.C. § 11501 where prior decisions of this Court have held that such allocations are an exercise of the States' police power?

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Respondents, Pennsylvania Public Utility Commission, David W. Rolka, Joseph Rhodes, Jr., John M. Quain, Lisa Crutchfield, and John Hanger (Commission) respectfully request that this Court deny the petition for writ of certiorari, seeking review of the opinion of the Third Circuit Court of Appeals in this case. The Court of Appeals' opinion is reported at 141 F.3d 88.

ARGUMENT

The Court of Appeals' ruling that the Commission's allocation of costs to the Petitioner is not a tax is consistent with the prior decisions of this Court.

The Court of Appeals correctly overruled the decision of the District Court and correctly held that the Commission's allocation of a portion of the costs to Wheeling and Lake Erie Railway Company for replacement of a highway bridge over its facilities was not a tax pursuant to 49 U.S.C. § 11501. The Court's ruling does not conflict with any decision of this Court nor with any decision of any other Court of Appeals. The case does not warrant this Court's review.

The Petitioner argues that the Court of Appeals incorrectly construed 49 U.S.C. § 11501 in determining that the Pennsylvania Public Utility Commission's allocation of a portion of the costs to the Petitioner for replacement of a highway bridge over the Petitioner's facilities was not a tax. The statute at 49 U.S.C. § 11501 does not define the term "tax." Furthermore, the statute does not state that rail-highway crossing construction and maintenance costs are covered. Faced with this lack of specificity, the Court of Appeals had to determine whether the term "tax" included rail highway crossing construction and maintenance costs.

The Court of Appeals noted this Court's decision in *Department of Revenue v. ACF Industries, Inc.*, 510 U.S. 332 (1994) which stated that 49 U.S.C. § 11501(b)(4) should be interpreted narrowly. 141 F.3d at 94. The Court of Appeals stated that in determining whether rail-highway crossing construction and maintenance costs were to be considered taxes under 49 U.S.C. § 11501, it should consider the context of the term "tax" and the Congressional policy underlying the statute. 141 F.3d at 95. The

Court of Appeals observed that the Pennsylvania Public Utility Commission's authority to allocate rail-highway crossing costs to railroads and other parties has existed since 1913, long before Congress enacted 49 U.S.C. § 11501. 141 F.3d at 96. The Court of Appeals concluded that Congress did not intend to treat the Pennsylvania Public Utility Commission's allocation of rail-highway crossing costs as a tax when it enacted 49 U.S.C. § 11501. The Court of Appeals' conclusion is consistent with prior decisions of this Court.

Prior to Congress enacting 49 U.S.C. § 11501, this Court consistently upheld the authority of the States to allocate the costs of construction and maintenance of at-grade, above-grade and below-grade crossings to railroads. See *Chicago, Burlington and Quincy Railroad Company v. Chicago,* 166 U.S. 226 (1897) (Cost of construction and maintenance of new at-grade crossing); *New York and New England Railroad Company v. Bristol,* 151 U.S. 556 (1894) (Cost of construction and maintenance of new grade separated crossings); *Chicago, Burlington and Quincy Railroad Company v. Nebraska,* 170 U.S. 57 (1898) (Cost of maintenance of highway bridge); *Cincinnati, Indianapolis and Western Railway Company v. Connersville,* 218 U.S. 336 (1910) (Cost of constructing railroad bridge over highway). In upholding the States' authority to allocate these costs to railroads, this Court has never found such allocations to be an exercise of the States' taxing power. Rather, this Court has consistently held that these cost and maintenance allocations were part of the States' police powers to control occupancy of their public streets in order to assure the safety of the public. *See Erie Railroad Company v. Public Utility Commission,* 254 U.S. 394 (1921); *Atcheson, Topeka and Santa Fe Railway v. Public Utility Commission,* 346 U.S. 346 (1953).

Congress is presumed to know about existing law related to the legislation it enacts. *Goodyear Atomic Corporation v. Miller,* 486 U.S. 174 (1998). Congress would have been aware from this Court's decisions that the States' allocation of rail highway crossing construction and maintenance costs was not a tax when it enacted 49 U.S.C. § 11501. Congress would also have been aware that these allocations had a financial impact on the railroads. Had Congress wished to include those costs as covered by the statute it could have done so by stating that in the statute. Congress did not do this. In all the hearings and committee reports on 49 U.S.C. § 11501, Congress did not even debate whether these costs should be prohibited by the statute. In fact, neither the hearings or committee reports on the legislation mention rail highway crossing construction and maintenance costs. The lack of specific language in the statute referring to rail highway crossing costs and the lack of references to rail highway crossing costs in the legislative history of the statute, combined with Congress' presumed knowledge of this Court's prior decisions, leads to the conclusion that Congress never intended 49 U.S.C. § 11501 to apply to such costs.

The Petitioner cites *National Railroad Passenger Corporation v. Commonwealth of Pennsylvania, Pa. P.U.C.,* 848 F.2d 436 (3rd Cir. 1988), *cert. denied,* 488 U.S. 893 (1988) and *SEPTA v. Pa. P.U.C.,* 826 F. Supp. 596 (E.D. Pa. 1993), *aff'd,* 27 F.3d 558 (3rd Cir. 1994), *cert. denied,* 115 S. Ct. 318 (1994) as support for its contention that the rail highway crossing construction and maintenance costs imposed by the Commission are a tax. The Court of Appeals found these cases inapplicable. The Court of Appeals concluded that the definition of tax was a matter of federal law as drawn from Congressional policy underlying the statute. 141 F.3d at 95. The

Court of Appeals found that the policy underlying the statutes at issue in *National Railroad Passenger Corporation* and *SEPTA* was different from the policy underlying 49 U.S.C. § 11501. The Court of Appeals found that Congress intended that National Railroad Passenger Corporation and SEPTA be exempt from state and local taxes and fees to the same extent as the federal government. 141 F.3d at 95. The Court of Appeals did not find any such intent when Congress enacted 49 U.S.C. § 11501. The Court of Appeals concluded that the rail highway crossing construction and maintenance costs imposed by the Commission were not a "tax" for purposes of 49 U.S.C. § 11501 even though they were a "tax or other fee" in the *National Railroad Passenger Corporation* and *SEPTA cases.* 141 F.3d at 96.

The Commission believes that its rail highway crossing construction and maintenance cost allocations are not "taxes" for purposes of 49 U.S.C. § 11501 or "taxes or other fees" for purposes of the statutes at issue in the *National Railroad Passenger Corporation* and *SEPTA* decisions and that this Court should overrule the Court of Appeals' decisions in *National Railroad Passenger Corporation* and *SEPTA*. The Court of Appeals for the Second Circuit has refused to follow the Third Circuit's rationale. *National Railroad Passenger Corporation v. City of New York,* 882 F.2d 710 (2nd Cir. 1989). Pennsylvania appellate courts have also refused to follow the Court of Appeals for the Third Circuit. *City of Philadelphia v. Pa. P.U.C.,* 676 A. 2d 1298 (Pa. Commw. Ct. 1996), *alloc. denied,* 546 Pa. 657 (1996), *cert. denied,* 520 U.S. 1155 (1997); *SEPTA v Pa. P.U.C.,* 592 A.2d 797 (Pa. Commw. Ct. 1991), *alloc. denied,* 611 A.2d 714 (1992).

The Court of Appeals for the Third Circuit also rejected the Petitioner's argument that the allocation of rail

highway crossing maintenance and construction costs to it constitutes a tax because such an allocation relieves the government entities of a portion of the costs of building and maintaining the bridge. 141 F.3d at 97. The Court of Appeals found that the allocation of construction and maintenance costs to the Petitioner did not contribute to the general fund of either the Commonwealth of Pennsylvania or the local government entities and is specific to a particular crossing. These facts led the Court to conclude that the allocation was not a tax. The Court of Appeals cited *Chicago and Northwestern Transportation Company v. Webster County*, 71 F.3d 265 (8th Cir. 1995) and *Union Pacific Railroad Company v. Public Utility Commission of Oregon*, 889 F.2d 854 (9th Cir. 1990) as cases where the Courts of Appeals held that certain levies were not taxes even though they relieved state or local government entities of financial burdens. 141 F.3d at 97. The mere fact that the state or local government is relieved of a financial burden is not dispositive on the issue of whether a particular levy is a tax for purposes of 49 U.S.C. § 11501.

The Petitioner has failed to recognize that the States have the authority to regulate the occupancy and use of their public streets in order to promote safety and prevent accidents pursuant to their police powers. Any entity seeking to occupy a portion of the public highway, including any portion above or below that public highway must seek approval from the State and comply with the State's terms and conditions for that use or occupancy. The Pennsylvania Public Utility Commission exercises authority over rail highway crossings and the railroad occupancy of public highways in the Commonwealth of Pennsylvania. The Petitioner may occupy the public highways of the Commonwealth of Pennsylvania subject to the terms and conditions determined by the Pennsylvania

Public Utility Commission as necessary to promote safety and prevent accidents. In this case, the Pennsylvania Public Utility Commission concluded that the Petitioner benefited from the new highway bridge constructed over its facilities and allocated a portion of the construction and maintenance costs for the bridge to it based on the benefit the Petitioner received. The statute at 49 U.S.C. § 11501 does not alter the Petitioner's obligation to comply with the Pennsylvania Public Utility Commission's order.

CONCLUSION

Further review by this Court is not warranted. This Court should deny the petition for writ of certiorari.

Respectfully submitted,

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